Capital Insurance Bhd v Aishah bte Abdul Manap & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–1 OF 2000(B)

CHONG SIEW FAI CJ (SABAH AND SARAWAK), MOHAMAD DZAIDDIN AND DENIS ONG FCJJ

28 JULY 2000

Civil Procedure *— Appeal — Record of appeal — Non compliance with r 18(4)(d) and 18(7) of Rules of the Court of Appeal 1994 — Subject matter of appeal not from judgment of Court of Appeal in respect of cause or matter decided by High Court in exercise of its original jurisdiction — Preliminary objection as to jurisdiction of Federal Court to hear appeals from Court of Appeal raised — Preliminary objection summarily dismissed at leave stage — Whether preliminary objection that record of appeal was bad in law should be allowed*

When the appeal came up for hearing before the Court of Appeal, the respondents raised a preliminary objection that the record of appeal was bad in law and ought to be set aside for non-compliance with r 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. The Court of Appeal upheld the preliminary objection and dismissed the appeal. The appellant appealed to the Federal Court. The respondents raised a preliminary objection in respect of the jurisdiction of the Federal Court to hear the appeal. It was submitted that the subject matter of the appeal was not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s 96(a) of the Courts of Judicature Act 1964 ('the Act'). It was contended that the present appeal was in respect of the decision of the Court of Appeal on a preliminary objection taken up on behalf of the respondents before the hearing of the appeal on the merits.

Held, dismissing the appeal:

(1) After considering the background facts and the authorities, the court agreed that the present appeal was from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record were defective for non-compliance of r 18(4)(d) and 18(7) of the Court of Appeal Rules 1994. It was patently clear that the subject matter of the present appeal was not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction (see p 68G–I).

(2) Since the preliminary objection related to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was

improper was summarily dismissed by the court, the respondents were entitled to raise this preliminary objection and the court could entertain the application (see p 70A). A

[Bahasa Malaysia summary B

Bilamana rayuan tiba untuk perbicaraan di hadapan Mahkamah Rayuan, responden-responden telah membangkitkan bantahan awal bahawa rekod rayuan tersebut tidak sempurna di sisi undang-undang dan haruslah diketepikan kerana ketidak-patuhan dengan k 18(4)(d) dan 18(7) Kaedah-Kaedah Mahkamah Rayuan 1994. Mahkamah Rayuan telah membenarkan bantahan awal dan menolak rayuan tersebut. Perayu telah merayu kepada Mahkamah Persekutuan. Responden-responden telah membangkitkan satu bantahan awal berhubung dengan bidang kuasa Mahkamah Persekutuan untuk mendengar rayuan tersebut. Dihujahkan bahawa hal perkara rayuan tersebut bukannya daripada penghakiman Mahkamah Rayuan berhubung dengan mana-mana kausa atau perkara sivil yang diputuskan oleh Mahkamah Tinggi dalam melaksanakan bidang kuasa asalnya di dalam lingkungan maksud s 96(a) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Ditegaskan bahawa rayuan semasa adalah berhubung keputusan Mahkamah Rayuan atas satu bantahan awal yang telah dibuat bagi pihak responden-responden sebelum perbicaraan rayuan tersebut atas merit. C D E

Diputuskan, menolak rayuan tersebut:

(1) Selepas mempertimbangan fakta-fakta latarbelakang serta autoriti-autoriti, mahkamah telah bersetuju bahawa rayuan semasa adalah daripada keputusan Mahkamah Rayuan atas bantahan awal yang dibuat oleh responden-responden dalam mana mahkamah telah memutuskan bahawa rekod rayuan tersebut adalah cacat kerana ketidak-patuhan k 18(4)(d) dan 18(7) Kaedah-Kaedah Mahkamah Rayuan 1994. Adalah amat jelas bahawa hal perkara rayuan semasa bukannya daripada penghakiman Mahkamah Rayuan berhubung dengan kausa atau perkara yang telah diputuskan oleh Mahkamah Tinggi dalam melaksanakan bidang kuasanya yang asal (lihat ms 68G–I). F G

(2) Oleh kerana bantahan awal berkaitan dengan persoalan bidang kuasa Mahkamah Rayuan untuk mendengar rayuan-rayuan daripada Mahkamah Rayuan, dan mengambil kira bahawa di peringkat memperolehi kebenaran, bantahan awal yang dibuat oleh responden-responden bahawa permohonan kebenaran adalah tidak sempurna telah ditolak terus oleh mahkamah, responden-responden berhak untuk membangkitkan bantahan awal ini dan mahkamah boleh melayan permohonan tersebut (lihat ms 70A).] H I

Notes

For cases on record of appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 1999 Reissue) paras 865–890.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549 (refd)
Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1 (refd)
Lane v Esdaile [1891] AC 210 (refd)
M Pr Kannappa Chettiar v LRM Letchumanan Chettiar [1952] MLJ 188 (refd)
Penang Port Commission v Kanawagi al Seperumaniam [1997] 2 MLJ 300 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 68(1)(a), 78(1), 96(a)
Rules of the Court of Appeal 1994 r 18(4)(d), (7)

Appeal from: Civil Appeal No B–02–155 of 1995 (Court of Appeal, Kuala Lumpur); Civil Suit No 23091 of 1994 (High Court, Shah Alam)

V Sivaparanjothi (*Manjit Singh, Sri Kumar* and *S Rutheran* with him) (*Sri Ram & Co*) for the appellant.
Yusuf Khan bin Ghows Khan (*BS Sidhu* and *Sharon Sidhu* with him) (*BS Sidhu & Co*) for the responden.

Mohamed Dzaiddin FCJ (delivering judgment of the court): This appeal came up for hearing before us on 9 May 2000. The panel was headed by Tan Sri Chong Siew Fai CJ (Sabah and Sarawak).

At the outset of the proceeding, En BS Sidhu, counsel for the respondents raised a preliminary objection in respect of the jurisdiction of this court to hear the appeal. Notice of the preliminary objection was given to the appellant's solicitors by fax on 5 May 2000.

The sole ground of the objection is that the subject matter of the appeal is not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s 96(a) of the Courts of Judicature Act 1964 ('the Act'). It was the contention of the respondents' counsel that the present appeal is in respect of the decision of the Court of Appeal on a preliminary objection taken up on behalf of the respondents before the hearing of the appeal on the merits.

The record of appeal established the following facts. On 26 August 1999 when the appeal came up for hearing before the Court of Appeal, counsel for the respondents raised a preliminary objection that the record of appeal was bad in law and ought to be set aside for non-compliance with r 18(4)(d) and (7) of the Rules of the Court of Appeal 1994. The reasons for non-compliance were that the record did not contain the sealed copy of

the judgment of the court below and it did not contain a copy of the order of the court. A

After hearing counsel, the Court of Appeal upheld the preliminary objection of the respondents and dismissed the appeal. In its written grounds of judgment delivered on 6 December 1999, the court per Mokhtar Sidin JCA held as follows (pp 438–439 of the appeal record): B

> The issue whether the appeal record should be set aside on the ground of non-compliance with the Rules of the Court of Appeal was not decided by the Federal Court. As such the respondents have the right to raise that issue before us. Further, we are of the view the issue of non-compliance with the Rules is by itself a merit to be decided in this appeal. It is clear to us that when the appeal record is not filed or defective then there is no appeal before us for which we could consider. C
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> For the above reasons we uphold the preliminary objections by the respondents. We hold that the appeal record and the supplementary appeal record are defective. We also hold that the supplementary appeal record was filed out of time without any leave of the court. Therefore, there is no proper appeal record before us for us to consider. This appeal is hereby dismissed with costs. Costs awarded is for a single counsel. Deposit to the respondent towards account of taxed costs. D

After hearing submissions of counsel, we reserved our decision on the preliminary objection to a later date to enable Denis Ong JCA to have a look at the latest decision of the Federal Court on a similar point in the case of *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1. In the meantime, on 3 July 2000, Chong Siew Fai CJ (Sabah and Sarawak) retired and ceased to exercise his function as a judge of this court. However, under s 78(1) of the Act, the remaining two judges shall, for the purpose of this proceeding, be deemed to be duly constituted notwithstanding the inability of Chong Siew Fai CJ (Sabah and Sarawak) to act as a judge. In addition, under para (2), the proceeding shall be determined in accordance with the opinion of the majority of the remaining two judges, and if there is no majority the proceeding shall be reheard. E F

Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record and the supplementary appeal record were defective for non-compliance of r 18(4)(d) and (7) of the Court of Appeal Rules 1994. As was stated in *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 it is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies. Thus, it is patently clear that the subject-matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. The material part of s 96(a) of the act reads as follows: G H I

A [A]n appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court ...

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction ... .

B A similar question arose in *Lam Kong*, on whether the decision of the Court of Appeal, upon a motion by the respondent, striking out the applicant's notice of appeal for non-compliance with s 68(1)(a) was appealable to the Federal Court under s 96(a) of the Act. The Federal Court, by a majority decision, held it was not appealable because the application for leave was not based on the judgment or order of the Court of Appeal in respect of a C civil cause or matter decided by the High Court. The majority decision in *Lam Kong* followed *Auto Dunia* which held that the refusal of leave to appeal by the Court of Appeal was not a judgment or order within the meaning of s 96(a) of the Act. More importantly, *Lam Kong* stressed that the policy consideration in *Auto Dunia*, following *Lane v Esdaile* [1891] AC 210 should be adhered to, otherwise the 'introduction of the 'filter' requiring D leave would be pointless.' Needless to say, we are in complete agreement with the reasoning and conclusion of the majority judgment of *Lam Kong*.

Accordingly, we uphold the preliminary objection and dismiss this appeal with costs. Deposit to be paid to the respondents to account of their taxed costs.

E There is however one interesting point which deserves our consideration. From the chronology of events, on 17 February 2000 an application for leave to appeal against the Court of Appeal decision was granted by this court in which I sat as a panel member. A preliminary objection taken by the respondents that the application was improper was F summarily dismissed by the court. In view of leave to appeal having been granted earlier by this court, can the respondents raise here a preliminary objection that this court has no jurisdiction to hear the appeal?

Encik Yusuf Khan for the respondents contended that they can raise the issue of want of jurisdiction at this stage. He reasoned that s 96 of the Act basically deals with the jurisdiction of the Federal Court to hear appeals G from the Court of Appeal upon leave being granted. He submitted that in the present case the Federal Court at the leave stage did not decide the issue of jurisdiction on the merit, but in granting leave to appeal, he said the court considered 'the appropriateness of matters raised for appeal becoming the subject of appeal.' Hence, since the issue of jurisdiction was not considered H by the earlier panel when granting leave to appeal, the respondents are entitled to raise the issue here. Counsel relied on the decision of the Court of Appeal in *Penang Port Commission v Kanawagi al Seperumaniam* [1997] 2 MLJ 300 which held (at p 302):

I The dismissal of the respondent's application for leave to appeal by the Federal Court could not be taken as a decision of the Federal Court on merit of the issue of jurisdiction of the Court of Appeal, because in an application for leave to appeal, the Federal Court considered whether or not there existed the question of law involving public interest.

In our view, there is much force in the submission. Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application. In this regard, we would rely on the decision of Thomson J in *M Pr Kannappa Chettiar v LRM Letchumanan Chettiar* [1952] MLJ 188. In an application to the High Court by way of an appeal from the decision of the Rent Assessment Board, the Board refused permission to the appellant to apply to the appropriate court for ejectment of the respondent. It was held that the High Court has no jurisdiction to entertain appeals from any statutory tribunals unless such jurisdiction is expressly given by the statute. In his judgment, Thomson J (as he then was) stated (at p 190):

> I would add that I have considered the question of whether in view of the fact that the point of want of jurisdiction was not taken by either of the parties I should not hold that it has been waived. On such a point, however, it seems to be that where there is a complete lack of jurisdiction there can be no question of waiver and that it is the duty of the court to take and deal with the point if it is not raised by the parties. As was said by Viscount Simon LC, in the case of *Westminster Bank Ltd v Edwards*:
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> > 'A court not only may, but should take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right to appeal exists. Vaughan Williams LJ in *Norwich Corporation v Norwich Electric Tramways Co Ltd*, formulated the proposition thus: "If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself ".'

In conclusion, I would like to put it on record that I have shown this judgment in draft to my learned brother Denis Ong JCA, who agreed with the reasoning and the conclusion.

Appeal dismissed.

Reported by Jafisah Jaafar